

NOT FOR PUBLICATION

**IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

ANTONIO SANTILLAN,)	
)	
Plaintiff,)	
)	
v.)	
)	
NASSER SHARMOUJ, and ZILA)	CIVIL NO. 2001/0065
SHARMOUJ, Individually and)	
d/b/a PRINCESSE CASH & CARRY,)	
and NASSER SHARMOUJ and ZILA)	
SHARMOUJ and SAMIRA SHARMOUJ)	
Individually and d/b/a TARGET)	
TIRE and BATTERY,)	
)	
Defendants.)	
<hr style="width: 40%; margin-left: 0;"/>)	

MEMORANDUM OPINION

THIS MATTER comes before the Court on the Motion for Summary Judgment filed by Defendants Zila Sharmouj and Samira Sharmouj. Plaintiff Antonio Santillan opposes such motion. For the reasons given below, the motion is denied in part and granted in part.

I. Facts

Zila Sharmouj was the sole proprietor of Princesse Cash & Carry, which she began operating in 1997. She employed her son, Nasser Sharmouj. Around 1999, she began constructing a building on Plot 1-K Little Princesse ("Plot 1-K"), adjacent to Princesse Cash & Carry. She owns the land upon which the building was constructed. She intended this building to be used for a

separate business that would specialize in tire sales and repair and automobile mechanical work.

Nasser Sharmouj is not a licensed contractor. He learned the construction industry through helping friends and assisting with the building of Princesse Cash & Carry. Even so, Zila Sharmouj gave Nasser Sharmouj the responsibility of constructing and managing the construction of the building on Plot 1-K. Zila Sharmouj supplied the drawings for the building and the money that Nasser Sharmouj used to pay for the building materials, labor and equipment. Zila Sharmouj periodically monitored the manner in which her money was spent. However, Nasser Sharmouj controlled the construction process.

Nasser Sharmouj hired Santillan to help him with the construction. On June 2, 1999, in the course of transferring plywood from a forklift to the roof of the building under construction, Santillan fell from the roof height to the ground. He landed in such a manner that he suffered severe injuries.

When the construction of the building on Plot 1-K was completed in 2000, Zila Sharmouj moved her business to Plot 1-K and began using the name Target Tire & Battery.

In April 2001, Santillan filed this negligence action against Nasser Sharmouj and Zila Sharmouj. In January 2002, Zila

Sharmouj gave the Target Tire & Battery business license to her daughter, Samira Sharmouj without receiving any consideration. Santillan then amended his Complaint in July 2002, adding Samira Sharmouj Individually and d/b/a Target Tire and Battery as a defendant.

Samira Sharmouj does not reside in St. Croix and did not reside in St. Croix at the time of Santillan's fall. At the time of the accident, she had no interest in the land on which the accident occurred. Nasser Sharmouj, who was employed by Zila Sharmouj as manager of Target Tire and Battery since it opened, continues to work for Samira Sharmouj in that same position. Samira Sharmouj infrequently discusses the business with Nasser Sharmouj and spends a few days at Target Tire and Battery when she visits St. Croix three or four times a year.

II. Standard for Summary Judgment

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Hersch v. Allen Products Co.*, 789 F.2d 230, 232 (3d Cir. 1986). "[A]t the summary judgment stage the judge's

function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

The movant has the initial burden of showing there are no "genuine issues of material fact," but once this burden is met it shifts to the non-moving party to establish specific facts showing there is a genuine issue for trial. *Gans v. Mundy*, 762 F.2d 338, 342 (3d Cir. 1985). To defeat a motion for summary judgment, the non-movant must "point to an evidentiary conflict created on the record." *Armco, Inc., v. Cyclops Corp.*, 791 F.2d 147, 149 (Fed. Cir. 1986). "Speculation, conclusory allegations, and mere denials are insufficient to raise genuine issues of material fact." *Rhames v. Sch. Dist. of Philadelphia*, 2002 U.S. Dist. LEXIS 13816, at *6 (E.D.Pa. 2002) (citation omitted). "[T]here is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." *Anderson*, 477 U.S. at 249. In making this determination, this Court draws all reasonable inferences in favor of the non-moving party. See *Bd. of Educ. v. Earls*, 536 U.S. 822, 850 (2002).

III. Defendant Zila Sharmouj's Liability

Santillan has alleged that the negligence of Zila and Samira Sharmouj led to his injury. "The elements of negligence are well established: duty, breach of duty, causation, and damages."

Charleswell v. Chase Manhattan Bank, N.A., 308 F. Supp. 2d 545, 571 (D.V.I. 2004) (citing *Gass v. V.I. Tel. Corp.*, 149 F. Supp. 2d 205, 209 (D.V.I. 2001) and the Restatement (Second) of Torts § 281).

Zila Sharmouj contends that she cannot be held liable to Santillan for his damages because she had no duty toward him. Santillan responds that Zila Sharmouj can be held vicariously liable for the negligence of her employee Nasser Sharmouj under the doctrine of *respondeat superior* and that Zila Sharmouj also had a duty to provide him with safe working conditions.¹

According to the Restatement (Second) of Agency § 219(1), which is controlling in the Virgin Islands, see 1 V.I.C. § 4, "[a] master is subject to liability for the torts of his servants committed while acting in the scope of their employment." Zila

¹ Santillan also opposes summary judgment on the grounds that Zila Sharmouj negligently hired Nasser Sharmouj to construct the building on Plot 1-K and negligently supervised Nasser Sharmouj during the course of construction. However, since these claims have not been pled, the Court will not address them. See First Amended Complaint.

Sharmouj does not contest this restatement of the doctrine of *respondeat superior*. She argues that it does not apply because Nasser Sharmouj was an independent contractor and was not acting within the scope of his employment with her when Santillan fell.

Section 220(2) of the Restatement (Second) of Agency differentiates an employee or servant from an independent contractor:

In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

During his deposition and in his answers to interrogatories, Nasser Sharmouj never mentions working as an independent contractor at any time in his life. He states, unequivocally, that he was employed by Princesse Cash & Carry when Santillan was injured. Nasser Sharmouj does not have any sort of contractor's license. He did not provided Zila Sharmouj with a proposal for the work to be performed, as an independent contractor typically would. Nasser Sharmouj has never worked for anyone besides his family. Before he began constructing the building, he was an employee of Zila Sharmouj and after he completed the construction of the building, he was also an employee of Zila Sharmouj. He was compensated in the same manner, before, during, and after the construction of the building. He was not paid a sum of money for constructing the building. These facts tend to show that Nasser Sharmouj was Zila Sharmouj's employee rather than an independent contractor.

Thus, although Zila Sharmouj relinquished the control of the construction of the building to Nasser Sharmouj, there is a genuine issue as to whether Nasser Sharmouj constructed the

building as Zila Sharmouj's employee or as an independent contractor. Where, as here, there is a genuine issue of material fact as to whether an alleged tortfeasor was hired as an employee or an independent contractor, the question of the negligent individual's status is for the fact-finder and summary judgment is not warranted. *See, e.g., Drexel v. Union Prescription Centers, Inc.*, 582 F.2d 781, 788 (3d Cir. 1978); *see also* Fed. R. Civ. P. 56(c).

IV. Defendant Samira Sharmouj's Liability

Samira Sharmouj moves for summary judgment contending that she cannot be held liable in negligence because she did not owe Santillan a duty. Santillan argues that Samira Sharmouj is also liable because she is the successor in interest to Target Tire and Battery. That argument, however, is unsupported in law and must be rejected.

Target Tire and Battery is not a separate legal entity. Rather, it exists only as the alter ego of Samira Sharmouj, the party in interest to whom liability may attach. *See Carty v. Beech Aircraft Corp.*, 679 F.2d 1051, 1065 (3d Cir. 1982) ("[A] sole proprietorship has no legal existence apart from its owner." (quoting *In re Grand Jury Empaneled Feb. 14, 1989*, 597 F.2d 851, 859 (3d Cir. 1979))). In order to prove that Samira Sharmouj is

liable, Santillan must establish the four elements of negligence: duty, breach of duty, causation, and damages. *Charleswell*, 308 F. Supp. 2d at 571 (citing *Gass v. V.I. Tel. Corp.*, 149 F. Supp. 2d 205, 209 (D.V.I. 2001) and the Restatement (Second) of Torts § 281).

It is undisputed that Samira Sharmouj was not at the site at the time of Santillan's injury. Additionally, she did not have any involvement in the construction of the building. It is also undisputed that Samira Sharmouj had no interest in the property or business on Plot 1-K until Zila Sharmouj transferred Target Tire & Battery to Samira two and a half years after the accident.

In the face of these undisputed facts, Santillan has presented no evidence by way of affidavits, depositions, answers to interrogatories, or admissions that Samira Sharmouj was involved at all in Santillan's accident. Even his Amended Complaint only attributes negligence to her generally as a part of the "Defendants." For instance, he states that "Defendants' premises were in an unsafe condition The accident was directly caused by the negligence of the Defendants." [First Amended Compl. at 2.] Yet it is undisputed that Samira Sharmouj was not an owner of the premises such that she would be responsible for any unsafe conditions. In fact, Santillan's own

brief in opposition to the motion for summary judgment states "Zila Sharmouj owns the land the [Target Tire & Battery] building is on." [Opp. at 3.]

Accordingly, Samira Sharmouj did not owe a duty to Santillan, nor could there be any causation between anything she did or failed to do which could have resulted in Santillan's injuries. In the absence of any genuine issue of material fact, Samira Sharmouj is entitled to summary judgment as a matter of law.

V. Conclusion

Because there are genuine issues of material fact as to whether Zila Sharmouj employed Nasser Sharmouj as an independent contractor or an employee, Zila Sharmouj's motion for summary judgment will be denied.

Because there are no genuine issues of material fact regarding Samira Sharmouj's duty to Santillan and because Samira Sharmouj is entitled to judgment as a matter of law, the motion of Samira Sharmouj for summary judgment will be granted.

DATED: April 3, 2006

CURTIS V. GÓMEZ
DISTRICT JUDGE

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A T T E S T:

Wilfredo F. Morales
Clerk of Court

by: _____
Deputy Clerk

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SHARMOUJ and SAMIRA SHARMOUJ)	
Individually and d/b/a TARGET)	
TIRE and BATTERY,)	
)	
Defendants.)	
_____)	

ORDER

Before the Court is a motion for summary judgment filed by defendants Zila Sharmouj and Samira Sharmouj. For the reasons stated in the accompanying memorandum of even date, it is hereby

ORDERED that the motion is **GRANTED** in part and **DENIED** in part; it is further

ORDERED that Zila Sharmouj's motion for summary judgment is **DENIED**; it is further

ORDERED that Samira Sharmouj's motion for summary judgment is **GRANTED**.

DATED: April 3, 2006

CURTIS V. GÓMEZ
DISTRICT JUDGE

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